

Two Additional Proposed Commercial Receivership Amendments



Staff Note: These two additional proposed commercial receivership amendments are also related to S.L. 2020-75, which added a new Article 38A on commercial receiverships to Chapter 1 of the General Statutes. In the opinion of GSC staff, both amendments are technical.

Revised Amendment #1:

Section #. G.S. 1-502 reads as rewritten:

"§ 1-502. In what cases appointed.

A receiver may be appointed in any of the following cases:

- (1) Before judgment, on the application of either party, when the party establishes an apparent right to property that is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired; a receiver, however, shall not be appointed in cases where judgment upon failure to answer may be had on application to the court.
- (2) After judgment, to carry the judgment into effect.
- (3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply the property in satisfaction of the judgment.
-  (4) ~~In cases provided in G.S. 1-507.1 and in similar cases, regarding property within this State of foreign corporations.~~
- (5) In cases where restitution is sought for violations of G.S. 75-1.1.
-  (6) In cases involving partition of real property, pursuant to G.S. 46A-28.

~~The provisions of Part 2 of Article 38 of Chapter 1 of the General Statutes apply to the appointment of a receiver of a corporation under this section."~~

Explanation:

At a previous meeting, the General Statutes Commission approved the deletion of the last sentence of this section since it contains an obsolete reference. Section 2(b) of S.L. 2020-75 repealed Part 2 of Article 38 of Chapter 1 of the General Statutes, effective January 1, 2021.

Upon further review, GSC staff noticed that subdivision (4) also contains an obsolete reference to G.S. 1-507.1, the first section of former Part 2 of Article 38 of Chapter 1 of the General Statutes. This proposed technical correction deletes this reference, since new Article 38A of Chapter 1 of the General Statutes, enacted by S.L. 2020-75, contains its own provision on applicability:

§ 1-507.21. Applicability of Article and of common law.

(a) Application of Article. – Except as provided in subsection (b) of this section, this Article applies to receiverships pursuant to any provision of the General Statutes, as well as any receiverships instituted under common law and the equitable power of the courts, in each case in which the debtor is an entity or an individual business debtor.

(b) Exclusions. – This Article does not apply to any receivership in which (i) the receiver is a State agency or in which the receiver is appointed, controlled, or regulated by a State agency unless otherwise provided by law or (ii) the receiver is appointed for a ward or a ward's estate pursuant to G.S. 35A-1294. No trust other than a business trust, no estate of a deceased individual, missing person, or absentee in military service, and no individual other than an individual business debtor may be a debtor in a receivership under this Article, and this Article shall not apply to receiverships of such persons. Nothing in this Article shall be construed in a manner that permits a receiver to seize an interest of the debtor in property that is not receivership property.

(c) Article Supplemental. – Unless explicitly displaced by a particular provision of this Article, the provisions of other statutory law and the principles of common law and equity remain in full force and effect and supplement the provisions of this Article.

(d) This Article shall not deny the right of an individual business debtor or an entity for which a limited receiver has been appointed pursuant to this Article to file a case under Title 11 of the United States Code.

New Amendment:

SECTION #. G.S. 53C-9-401 reads as rewritten:

"§ 53C-9-401. Statute Article relating to receivers applicable to insolvent banks.

The provisions of G.S. 1-507.1 through 1-507.11, Article 38A of Chapter 1 of the General Statutes, relating to receivers, when not inconsistent with the provisions of this Article, shall apply applies to the liquidation of banks under this Article."

Explanation:

This proposed technical amendment updates a reference to conform to the enactment of Article 38A of Chapter 1 of the General Statutes by S.L. 2020-75. G.S. 1-507.1 through 1-507.11 comprise former Part 2 of Article 38 of Chapter 1 of the General Statutes. Staff does not recommend the deletion of the phrase "when not inconsistent with the provisions of this Article," because G.S. 53C-9-301 is a lengthy provision specific to the receiverships of banks that is substantially different from Article 38A.

Background Information:

§ 53C-9-301. Receivership.

(a) The Commissioner may take custody of the books, records, and assets of every kind and character of any bank in the instances established in Part 2 of this Article or if it reasonably appears from one or more examinations made by the Commissioner that any of the following conditions exist:

- (1) The directors or officers of the bank, or the liquidators of the bank subject to a voluntary plan of liquidation, have neglected, failed, or refused to take action that the Commissioner deems necessary for the protection of the bank.
- (2) The directors, officers, or liquidators of the bank have impeded or obstructed an examination.
- (3) The business of the bank is being conducted in a fraudulent, illegal, or unsafe manner.

- (4) The bank is in an unsafe or unsound condition to transact business and it is not reasonably probable that it will be able to return to a safe and sound condition.
- (5) The capital of the bank is impaired such that the likely realizable value of its assets is insufficient to pay and satisfy the claims of all depositors and all creditors.
- (6) The directors or officers of the bank, or the liquidators of a bank subject to a voluntary plan of liquidation, have assumed duties or performed acts in excess of those authorized by applicable statutes or regulations, by the bank's organizational documents or plan of liquidation, or without supplying the required bond.
- (7) The bank is insolvent or is in imminent danger of insolvency or has suspended its ordinary business transactions due to insufficient funds.
- (8) The bank is unable to continue operations.

(b) Unless the Commissioner reasonably finds that an emergency exists that requires that the Commissioner take custody immediately, the Commissioner shall first give written notice to the board of directors of the bank specifying which of those circumstances listed in subdivisions (1) through (8) of subsection (a) have been determined to exist and shall allow a reasonable time in which corrections may be made before a receiver of the bank will be appointed as outlined in subsections (c) and (d) of this section. For these purposes, "written notice" shall be deemed to include any report of examination or other confidential or nonconfidential written communication that is either directly from the Commissioner or is joined in by the Commissioner.

(c) The Commissioner shall appoint as receiver or coreceivers one or more qualified persons for the purpose of receivership and liquidation of the bank of which the Commissioner has taken custody under subsection (a) of this section, which receiver shall furnish a bond in such form and amount, and with such surety, as the Commissioner may require.

(d) The Commissioner may appoint the FDIC or its nominee as the receiver, and the receiver shall be permitted to serve without posting bond. In the event of such an appointment, the Commissioner shall thereafter be forever relieved of any and all responsibility and liability in respect to the receivership and the liquidation of the bank.

(e) In the event the Commissioner takes custody of a bank and then appoints a receiver for the bank, the Commissioner shall serve personally at the bank's principal office through the officer who is present and appears to be in charge, the Commissioner's order taking possession and, if applicable, the Commissioner's order appointing a receiver for the bank in liquidation. The Commissioner shall also mail a certified copy of the order taking possession and the appointing order by certified mail or by express delivery to any previous receiver or other legal custodian of the bank and to the Clerk of Superior Court of Wake County. The Commissioner shall give notice to the public of the Commissioner's actions by posting a notice summarizing the Commissioner's actions near the entrance to each branch of the bank, and the Commissioner shall issue a similar public notice as defined in G.S. 53C-1-4(59).

(f) Whenever a receiver for a bank is duly appointed and qualified under subsection (c) or (d) of this section:

- (1) The receiver, by operation of law and without any conveyance or other instrument, act, or deed, shall succeed to all the rights, titles, powers, and privileges of the bank, its shareholders, officers, and directors, or any of them, and to the titles to the books, records, and assets of every description of any previous receiver or other legal custodian of the bank. Neither the shareholders,

officers, or directors, nor any of them, shall thereafter, except as expressly provided in this section, have or exercise any rights, powers, or privileges or act in connection with any assets or property of any nature of the bank in receivership.

- (2) The Commissioner may, at any time, direct the receiver (unless it is the FDIC) to return the bank to its previous or a newly constituted management and its shareholders.
- (3) A receiver, other than the FDIC, may, at any time during the receivership and before final liquidation, be removed and a replacement appointed by the Commissioner.
- (g) A receiver may perform any of the following acts:
 - (1) Demand, sue for, collect, receive, and take into possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, instruments, notes, intangible interests, and property of every description of the bank.
 - (2) Foreclose mortgages, deeds of trust, and other liens granted to the bank to the extent the bank would have the right to do so.
 - (3) Seek injunctions and institute suits for the recovery of any property, damages, or demands existing in favor of the bank, and shall, upon the receiver's own application, be substituted as party plaintiff in the place of the bank in any suit or proceeding pending at the time of the receiver's appointment.
 - (4) Sell, convey, and assign any or all of the property rights and interests owned by the bank.
 - (5) Appoint agents and engage independent contractors.
 - (6) Examine papers and investigate persons.
 - (7) Make and carry out agreements with the FDIC for the payment or assumption of the bank's liabilities, in whole or in part, and to sell, convey, transfer, pledge, or assign assets as security or otherwise and to make guarantees in connection therewith.
 - (8) Perform all other acts that might be done by the employees, officers, and directors of the bank.

These powers shall be continued in effect until liquidation of the bank or until return of the bank to its prior or newly constituted management.

(h) The Commissioner may, unless the FDIC has been appointed as receiver, determine that the receivership proceedings of a bank should be discontinued and the possession of the bank returned to newly constituted management. The Commissioner shall then remove the receiver and restore all the rights, powers, and privileges of the bank's depositors, shareholders, customers, employees, officers, and directors. The return of a bank to a newly constituted management from the possession of a receiver shall, by operation of law and without any conveyance or other instrument, act, or deed, vest in the bank the title to all property held by the receiver in the capacity as receiver for the bank.

(i) Claims against a bank in receivership shall have the following order of priority for payment:

- (1) Costs, expenses, and debts of the bank incurred on or after the date of the appointment of the receiver, including compensation for the receiver and a reasonable sum for the time of employees and agents of the OCOB.

- (2) Claims of holders of deposit accounts.
- (3) Claims of secured creditors in such order of priority as is established by applicable law or regulation.
- (4) Claims of general creditors.
- (5) Claims of holders of the bank's shares in the order of preference established by the bank's organizational documents.

(j) All claims of each class described within subsection (i) of this section shall be paid in full so long as sufficient assets are available therefor. Members of a class for which the receiver cannot make payment in full shall be paid an amount proportionate to their total claims.

(k) The Commissioner may direct the receiver to make payment of claims for which no provision is made in this section and may direct the payment of less than all claims within a class.

(l) When all assets of the bank have been fully liquidated, all claims and expenses have been paid or settled, and the receiver has recommended a final distribution, the dissolution of the bank in receivership shall be accomplished in the following manner:

- (1) The receiver shall file with the Commissioner a detailed report, in a form to be prescribed by the Commissioner, of the receiver's acts and proposed final distribution of the bank's assets.
- (2) Upon the Commissioner's approval of the final report of the receiver, the receiver shall make the final distribution of the bank's assets in any manner as the Commissioner may direct.
- (3) When any unclaimed property, including funds due to a known but unlocated depositor, remains following the final distribution of the bank's assets, such property shall be promptly transferred to the State Treasurer to hold in accordance with the provisions of Chapter 115B of the General Statutes.
- (4) Upon completion of the actions described in this subsection, the process of dissolution and liquidation of the bank shall be deemed complete, and the Commissioner shall issue a certification of completed liquidation to the Secretary of State.
- (5) Upon completion of the process of dissolution and liquidation, the Commissioner shall cause an examination of the receiver's activities and records to be conducted, with which the receiver shall assist. The accounts of the receiver shall then be ruled upon by the Commissioner, and if approved, the receiver shall be given a final and complete discharge and release. (2012-56, s. 4.)